



**DEPARTMENT OF DEFENSE  
DEFENSE OFFICE OF HEARINGS AND APPEALS**



In the matter of:	)	
	)	
-----	)	ISCR Case No. 09-08000
SSN: -----	)	
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Pamela C. Benson, Esquire, Department Counsel  
For Applicant: *Pro se*

September 30, 2010

**Decision**

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HOWE, Philip S., Administrative Judge:

On June 30, 2009, Applicant submitted his Security Clearance Application (SF 86). On February 1, 2010, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines H (Drug Involvement) and E (Personal Conduct). The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within the Department of Defense on September 1, 2006.

Applicant answered the SOR in writing on February 16, 2010, and requested a hearing before an administrative judge. Department Counsel was prepared to proceed on March 23, 2010, and I received the case assignment on March 24, 2010. DOHA issued a Notice of Hearing on April 9, 2010, and I convened the hearing as scheduled on May 4, 2010. The Government offered Exhibits 1 through 5, which were received without objection. Applicant testified and did not submit any exhibits. DOHA received

the transcript of the hearing (Tr.) on May 14, 2010. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

### **Findings of Fact**

In his Answer to the SOR, Applicant admitted all the factual allegations in the SOR. He also provided additional information to support his request for eligibility for a security clearance.

Applicant is 31 years old. He works for a defense contractor as a software engineer and has been employed with that company for eight years. He is married and has one child. In 2004, the government granted him a security clearance. He graduated from college in August 2002. (Tr. 12, 13; Exhibits 1, 2)

On November 9, 2007, Applicant was stopped by the local police for speeding. He drove 54 miles-per-hour in a 35 miles-per-hour zone. The officer observed Applicant speaking slowly, his hands were shaking, his eyes were bloodshot and glassy, and he displayed apprehension. The police officer also smelled marijuana in the car. He also saw a green leafy substance on the center console. A test on the leafy material confirmed marijuana. A consent search of Applicant's car followed. The police found a glass pipe with marijuana residue in it, a black tie cloth, a cigarette tin with marijuana residue in the driver side door compartment, a pair of scissors, a jar with a very strong odor of marijuana and residue in it, and large (one to two inches in length) marijuana stems scattered about the car. Applicant was handcuffed, placed in the back of the police car, and arrested for possession of drug paraphernalia. His car was towed to the police impound lot. Applicant's wife came to the police station and drove Applicant home that evening. (Tr. 16-18; Exhibits 2 and 3)

Applicant hired an attorney to represent him in court on the charges. The charges came to trial in March 2008. Applicant pled guilty to the three charges that were reduced to disorderly conduct. Applicant was fined \$300 and court costs on those three counts. The remaining three other counts were dismissed pursuant to the plea agreement. In June 2008, Applicant succeeded in getting the charges and court records expunged from the state files. (Tr. 28; Exhibits 2- 4)

Applicant was required to report the arrest and court action according to his company's Standard Practice Procedure contained in a written document. Pages 13 and 14 of this document require employees to report any adverse information "that calls into question an individual's trustworthiness, reliability or willingness to comply with established security requirements." The document requires "controlled substance abuse" and "Arrest, indictment or conviction of unlawful activity" to be reported to the corporate security office. Applicant did not report the November 2007 incident until June 2009. He claims his attorney told him he did not have to report it because he was detained instead of being arrested. Applicant admitted at the hearing he felt like he was arrested when he was handcuffed and taken to the police station. Applicant did not

produce any document from his attorney containing that advice. Applicant participated in his company's annual security briefings. Those briefings included reviews of the self-reporting requirements contained in the Standard Practice Procedure. (Tr. 20, 26; Exhibits 2 and 5)

Applicant admitted he used marijuana between 30 and 50 times between August and October 2007. He used it at concerts where he took photographs. He used marijuana at his home. Applicant claims he stopped using marijuana in October 2007. Applicant admitted in the DOHA interrogatories that he used marijuana twice in July 1996 and cocaine once at the same time period. He has not attended any controlled substance treatment or evaluation program pertaining to the use of marijuana. While using marijuana Applicant had a secret-level security clearance. Applicant claims he will not use marijuana in the future, having matured and becoming a father in May 2008. (Tr. 13-15, 24-37; Exhibits 2-4)

### **Policies**

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful in evaluating an applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, an "applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision."

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Section 7 of Executive Order 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

## **Analysis**

### **Guideline H, Drug Involvement**

AG ¶ 24 expresses the security concern pertaining to illegal drugs:

Use of an illegal drug or misuse of a prescription drug can raise questions about an individual's reliability and trustworthiness, both because it may impair judgment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations.

(a) Drugs are defined as mood and behavior altering substances, and include:

(1) Drugs, materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended (e.g., marijuana or cannabis, depressants, narcotics, stimulants, and hallucinogens), and

(2) inhalants and other similar substances;

(b) drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

AG ¶ 25 describes eight conditions that could raise a security concern and may be disqualifying. Four conditions apply:

(a) any drug abuse (see above definition);

(c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia;

(g) any illegal drug use after being granted a security clearance; and

(h) expressed intent to continue illegal drug use, or failure to clearly and convincingly commit to discontinue drug use.

Applicant admitted he used marijuana between 30 and 50 times from August 2007 to October 2007. He was arrested for possession of drug paraphernalia in November 2007. He previously used marijuana and cocaine in July 1996. After both periods of use, Applicant disclaimed any intention to use marijuana in the future. AG ¶ 25 (a) and (c) apply.

Applicant was granted a security clearance in 2004. He continued to hold that clearance until recently when it was suspended at the time the SOR was issued. He used marijuana in 2007, while holding that clearance. AG ¶ 25 (g) applies.

AG ¶ 26 provides four conditions that could mitigate security concerns:

(a) the behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;

(b) a demonstrated intent not to abuse any drugs in the future, such as:

(1) disassociation from drug-using associates and contacts;

(2) changing or avoiding the environment where drugs were used;

(3) an appropriate period of abstinence; and

(4) a signed statement of intent with automatic revocation of clearance for any violation;

(c) abuse of prescription drugs was after a severe or prolonged illness during which these drugs were prescribed, and abuse has since ended; and

(d) satisfactory completion of a prescribed drug treatment program, including but not limited to rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.

Applicant's marijuana use occurred in 2007, only three years ago. He used marijuana frequently during a three-month period. Within a month after the period of use, he was arrested for drug paraphernalia possession. He pled guilty to reduced charges and paid the fine. The arrest contradicts his statement that he only used marijuana until October 2007. His credibility is low because of his history of marijuana

use from 1996 to 2007 at different periods of his life. He also did not submit any professional drug treatment program evaluations about his marijuana use. Doubt is cast upon Applicant's current reliability, trustworthiness, and good judgment. AG ¶ 26 (a) does not apply.

Applicant claims he will not use marijuana in the future. He used it in 1996 and then used it again, by his admission, in 2007. He claims he does not attend concerts anymore, which was one venue of his drug use. The other location was in his home. He may not attend concerts anymore, but he continues to live at his home. He has no documentation to show a period of abstinence. His history makes his assertions suspect. AG ¶ 26 (b) does not apply.

There is no allegation of Applicant using prescription drugs nor did he complete a prescribed drug treatment program. AG ¶ 26 (c) and (d) do not apply.

### **Guideline E, Personal Conduct**

AG ¶ 15 expresses the security concern pertaining to personal conduct:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

The following will normally result in an unfavorable clearance action or administrative termination of further processing for clearance eligibility:

(a) refusal, or failure without reasonable cause, to undergo or cooperate with security processing, including but not limited to meeting with a security investigator for subject interview, completing security forms or releases, and cooperation with medical or psychological evaluation; and,

(b) refusal to provide full, frank and truthful answers to lawful questions of investigators, security officials, or other official representatives in connection with a personnel security or trustworthiness determination.

AG ¶ 16 describes seven conditions that could raise a security concern and may be disqualifying. Two conditions apply:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities; and

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing, or (2) while in another country, engaging in any activity that is illegal in that country or that is legal in that country but illegal in the United States and may serve as a basis for exploitation or pressure by the foreign security or intelligence service or other group.

Applicant deliberately omitted fulfilling the requirement in his company's Standard Practices Procedure to report his arrest in November 2007 for possession of drug paraphernalia to his company's security office. He concealed his drug use and arrest from his employer by not making the required report. The report would be used to determine employment qualifications and determine security clearance eligibility or trustworthiness. Therefore, it was an important reporting requirement that Applicant deliberately avoided. AG ¶ 16 (a) applies.

Applicant's failure to report his arrest and his use of marijuana while holding a security clearance made him vulnerable to exploitation, manipulation, or duress. His marijuana use may affect his personal, professional, or community standing adversely. AG ¶ 16 (e) applies.

AG ¶ 17 provides conditions that could mitigate security concerns:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully.

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur;

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress;

(f) the information was unsubstantiated or from a source of questionable reliability; and,

(g) association with persons involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

Applicant did not correct the omission for about 18 months, until June 2009. AG ¶ 17 (a) does not apply.

Applicant claims he did not report the 2007 arrest because of his attorney's advice that he was only detained not arrested by the police. However, Applicant admitted he knew he was arrested, but tried to rely on his attorney's advice that he was only detained by the police in November 2007. That reliance was misplaced, particularly in view of the annual training he received at this company about the reporting requirements. AG ¶ 17 (b) does not apply because he did not submit any documentation from his attorney supporting his assertion. Nor did he promptly report when he knew of the disclosure requirement during his May 2007, 2008, and 2009 annual training sessions.

The facts do not support the application of mitigating conditions contained in AG ¶ 17 (c) to (g). Applicant's offense is not minor, nor has enough time passed to conclude that his actions no longer cast doubt on his reliability and trustworthiness. Applicant has not obtained any counseling. There is no evidence of positive steps to reduce vulnerability. Applicant's admissions substantiate the allegations. Finally, there is no allegation or evidence Applicant associated with criminals.

### **Whole-Person Concept**

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of an applicant's conduct and all the circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

(1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.



AG ¶ 2(c) requires each case must be judged on its own merits. Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant was a mature adult when he smoked marijuana in 2007. He was 28 years old, married, and his wife was expecting their child, who was born in May 2008. Applicant knew what he was doing was illegal and should not have been done while holding a security clearance. He then tried to avoid reporting his arrest and marijuana use using a false description of the police action against him. He claimed it was a detainment instead of an arrest. He admits he was arrested. His personal pleasure motivated his drug use. His expressed intent to refrain from marijuana use in the future is not credible based on his history of use and his failure to submit any documentation from a drug treatment program that might have shown he was drug-free and now aware of the adverse effects of repeated marijuana use.

Overall, the record evidence leaves me with questions or doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant did not mitigate the security concerns arising from his drug involvement and personal conduct. I conclude the "whole-person" analysis against Applicant.

### **Formal Findings**

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline H:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Subparagraph 2.b:	Against Applicant

## **Conclusion**

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

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PHILIP S. HOWE  
Administrative Judge